

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Williamsburg County

Honorable R. Kirk Griffin, Circuit Court Judge

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JOHN D. COOK,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-001648

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JOHNSON PETITION FOR WRIT OF CERTIORARI
—————

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May 13 2024

S.C. SUPREME COURT

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ISSUE PRESENTED

Whether assistance of Petitioner's first Counsel was constitutionally deficient for failing to timely relay a potential guilty plea offer of 10 years before Petitioner's second Counsel later relayed an offer of 25 years to which Petitioner pled?

STATEMENT

On September 10, 2020, Petitioner John D. Cook was indicted by the Williamsburg County Grand Jury for disseminating harmful material to a minor, sexual exploitation of a minor, third-degree criminal sexual conduct with a minor (CSCM 3rd), second-degree criminal sexual conduct with a minor (CSCM 2nd), and seven (7) counts of first-degree criminal sexual conduct with a minor (CSCM 1st). App. 109-112. On July 15, 2021, he was further indicted for disseminating harmful material to a minor, sexual exploitation of a minor, CSCM 3rd, and three (3) counts of CSCM 1st. App. 113-115. The charges stemmed from his purported conduct occurring after the Department of Social Services (DSS) temporarily placed the children of his brother and sister-in-law with him. App. 29—App. 30; App. 33. Petitioner was initially represented by Doward Harvin (Counsel 1). However, after Mr. Harvin left the Office of the Public Defender, William J.V. Barr (Counsel 2) took over representation of Petitioner in May 2021. App. 73.

On October 18, 2021, Petitioner's case proceeded to a hearing before the Honorable Kristi F. Curtis (Plea Court). The State was represented by Assistant Solicitor Warren S. Anderson (ASOL 2), while Petitioner was represented by Counsel 2. App. 1. At the hearing, the State indicated Petitioner was expected to plead guilty, but was backing out. App. 3. Counsel 2 affirmed, and explained to the Plea Court that Petitioner wanted a trial, as well as another attorney appointed. App. 3—App. 4. Upon the Plea Court's inquiry, Petitioner indicated he indeed wanted a different attorney unaffiliated with the Williamsburg County Public Defender's Office. App. 5. He further explained that his phone messages to his attorney had gone unanswered, no expert had been retained, and he believed other offers were made but not conveyed. App. 5. The State informed the Court that a prior offer was made by the previous

Assistant Solicitor (ASOL 1) assigned to the case, but it was allegedly harsher: ASOL 1 stated the prior offer was to plead guilty to all charges and let the judge decide the sentence, whereas his offer was for Petitioner to plead to one charge for a recommended sentence of 25 years. App. 9; App. 11. The Plea Court denied Petitioner’s motion to relieve Counsel 2, but allowed the current plea offer to remain open until 9:30 am the following day. App. 14—App. 15.

On October 19, 2021, Petitioner was again brought before the Plea Court, and was still represented by Counsel 2. App. 19—App. 21. Petitioner pled guilty to one count of CSCM 1st, and his remaining charges were dismissed. The Plea Court imposed the recommended sentence of 25 years. App. 22; App. 29; App. 31; App. 34. No direct appeal was filed. App. 41; App. 101.

Petitioner filed his post-conviction relief (PCR) application on August 15, 2022, and the State filed its return on November 10, 2022. App. 40; App. 47. On June 13, 2023, the matter was heard before the Honorable R. Kirk Griffin. Petitioner was represented by Timothy L. Griffith, while the State was represented by Zachary W. Jones. App. 58. Witnesses at the hearing included Petitioner, Counsel 1, Counsel 2, and ASOL 2. App. 59.

Petitioner’s testimony included the assertion that a prior offer of 10 years was made in his case to Counsel 1, but never relayed to him. Specifically, he claimed that when he met with Counsel 2, he saw a sentencing sheet in Counsel 2’s briefcase with 10 years written on it. App. 68—App. 69. At that time, Petitioner testified that Counsel 2 said, “why didn’t you take this?” App. 69. After telling Counsel 2 that he had never seen it, Petitioner was informed, “well, it’s expired now so it doesn’t matter.” App. 69. Petitioner further confirmed that, had he been aware of a 10-year offer he would have accepted it. App. 69.

When asked about a 10-year offer in the case, Counsel 2 testified that an offer was made by ASOL 1. After seeing the 10-year sentencing sheet in Petitioner’s case file, Counsel 2 spoke

with ASOL 2. The prosecutor indicated “that offer was not made by [him] and that that was not the offer of the case and . . . what he had put forward was the first, last, and only offer that [Petitioner] had received.” App. 79—App. 80; App. 83. Counsel 2 also stated that there were multiple sentencing sheets in the file, indicating to him that there were multiple unsuccessful attempts to get Petitioner to plead. App. 83—App. 84.

Counsel 1 also testified regarding prior offers to Petitioner in the case during his period of representation. He denied that a 10-year offer was ever made. App. 90—App. 91. On cross-examination, he thought it was possible that a 25-year offer was made for one charge, and a 10-year offer made on another. App. 92. However, the only offer he was aware of was for 25 years. App. 92—App. 93.

Finally, ASOL 2 likewise testified regarding offers made in Petitioner’s case. According to him, “[t]here was never any offer made besides 25-years from [him].” App. 93—App. 94. Further he told the PCR Court that he reviewed the case file of ASOL 1, but did not see any offer made in the notes. App. 94.

On October 5, 2023, the PCR Court filed its Order dismissing Petitioner’s application. App. 100. The Court found the testimony of Counsel and ASOL 2 to be credible, and Appellant’s testimony contradictory to Counsels’ to be not credible. App. 106. The PCR Court further held *inter alia* that “Counsel did not fail to communicate any plea offers,” and dismissed the issue. App. 106. No motion was filed pursuant to Rule 59(e), SCRCP.

This petition for writ of certiorari follows.

ARGUMENT

Assistance of Petitioner's first Counsel was constitutionally deficient for failing to timely relay a potential guilty plea offer of 10 years before Petitioner's second Counsel later relayed an offer of 25 years to which Petitioner pled.

Petitioner clearly and unequivocally indicated another 10-year offer existed in his case file, and he saw the sentence sheet indicating as much when meeting with Counsel 2. Counsel 1 did not inform him of the prior offer before Petitioner pled guilty to a higher recommended sentence. As such, Counsel 1's performance was deficient. Moreover, Petitioner's testimony at the PCR hearing also indicated he would have accepted the lower plea offer if he was informed of it before it expired. Therefore, Petitioner's guilty plea and sentence should be reduced to that reflected by the prior offer and sentence sheet.

"Guilty pleas are no more foolproof than full trials to the court or jury. Accordingly, we take great precautions against unsound results." Brady v. United States, 397 U.S. 742, 758, 90 S.Ct. 1463, 147425 L.Ed.2d 747 (1970). "It is well settled that the right to the effective assistance of counsel applies to certain steps before trial. The 'Sixth Amendment guarantees a defendant the right to have counsel present at all 'critical' stages of the criminal proceedings.'" Missouri v. Frye, 566 U.S. 134, 140, 132 S.Ct. 1399, 1405, 182 L.Ed.2d 379 (2012) (quoting Montejo v. Louisiana, 556 U.S. 778, 786, 129 S.Ct. 2079, 173 L.Ed.2d 955 (2009)). "Critical stages include arraignments, postindictment interrogations, postindictment lineups, and the entry of a guilty plea." Id. (citing Hamilton v. Alabama, 368 U.S. 52, 82 S.Ct. 157, 7 L.Ed.2d 114 (1961) (arraignment); Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964) (postindictment interrogation); United States v. Wade, 388 U.S. 218, 227-28, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967) (postindictment lineup); and Argersinger v. Hamlin, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972) (guilty plea)).

“The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages.” Id. 566 U.S. at 143, 132 S.Ct. at 1407, 182 L.Ed.2d 379. Accordingly, “as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused.” Id. 566 U.S. at 153, 132 S.Ct. at 1408, 182 L.Ed.2d 379.

In the present case, Counsel 1 failed to communicate a favorable offer to Petitioner before it lapsed. Id. 566 U.S. at 147, 132 S.Ct. at 1409, 182 L.Ed.2d 379 (“Here defense counsel did not communicate the formal offers to the defendant. As a result of that deficient performance, the offers lapsed.”). Petitioner testified at the PCR hearing that when he met with Counsel 2 he saw a sentencing sheet in Counsel 2’s briefcase with 10 years written on it. App. 68—App. 69. Without objection, he further indicated that Counsel 2 responded by saying “why didn’t you take this?” App. 69. After informing Counsel 2 that he had never seen it, Petitioner was told, “well, it’s expired now so it doesn’t matter.” App. 69. In other words, evidence exists in the record that a prior offer existed with a lower sentence than that to which Petitioner ultimately pled, and that the offer had already lapsed by the time Petitioner was told of it.

Further, Counsel 2 did not deny seeing such paperwork in Petitioner’s file. In fact, he acknowledged the existence of multiple sentence sheets in Petitioner’s file and surmised that multiple attempts must have been made to plea the case. He further acknowledged that he proceeded to take the matter to ASOL 2 and discuss it App. 79—App. 80; App. 83—App. 84. Accordingly, at least this much of Counsel 2’s testimony is in accord with Petitioner’s testimony and claim that a more favorable offer was made, yet never communicated to him.

Counsel 1's testimony, while seemingly contradictory to Petitioner's claim of a prior offer being made, actually conceded at least a portion of Petitioner's testimony could have been accurate. First he flatly denied that a 10-year offer was ever made. App. 90—App. 91. However, on cross-examination, Counsel 1 thought it may be possible that a 25-year offer was made for one charge, and a 10-year offer made on another. App. 92.

Finally, while ASOL 2 never made an offer less than 25 years, he indicated to the PCR Court that his review of ASOL 1's notes the morning of the PCR hearing did not indicate a prior offer was even made. App. 93—App. 94. Yet the transcript from October 18, 2021, belies ASOL 2's assertion to the PCR Court; at that time, the State acknowledged there that a prior offer was indeed made by ASOL 1. App. 9. Although ASOL 2 told the Plea Court the prior offer was more severe, the contradiction with ASOL 2's testimony to the PCR Court *after examining ASOL 1's note before the PCR Hearing* show a discrepancy with ASOL 2's testimony between the two hearings, as well as a discrepancy with what he purportedly saw in ASOL 1's notes. In other words, ASOL 2's contradictory statements (1) refute his position that a prior offer was not made by ASOL 1, and (2) cast doubt upon his credibility regarding the contents of ASOL 1's notes pertaining to the actual offer previously made to Petitioner.

Contrary to the PCR Court's ruling, evidence existed in the record indicating a prior, more favorable offer was made to Petitioner by ASOL 1, but not timely conveyed. Even taking into consideration the PCR Court's ruling regarding credibility, the testimony of Counsel 1 and 2 align with facts supporting Petitioner's claim. Under cross-examination, Counsel 1 finally conceded that there may have been multiple sentence sheets in Petitioner's file, including one for 10-years. Further, Counsel 2's testimony indicates he likewise saw sentence sheets in

Petitioner's file. In fact, he was alarmed enough by them that he met with ASOL 2 to discuss the matter of a prior offer. Interestingly, Counsel 2 did not say ASOL 2 told him of a prior offer; rather, only that ASOL 2 indicated that *his* offer was 25 years. This too is in accord with Petitioner's testimony: when meeting with Counsel 2, he saw the 10-year plea sheet offer for the first time. It is also reasonable to infer that Counsel 2 understandably asked Petitioner about them, and asked why he rejected the offer before Counsel 2 met with ASOL 2 to further discuss the matter. Thus, credible evidence in the case readily indicates a prior, more favorable offer was made to Petitioner by ASOL 1, but not timely conveyed to Petitioner. Accordingly, the PCR Court erred for failing to find Counsel 1's performance constitutionally deficient. Frye, 566 U.S. at 147, 132 S.Ct. at 1409, 182 L.Ed.2d 379 ("Here defense counsel did not communicate the formal offers to the defendant. As a result of that deficient performance, the offers lapsed.").

Petitioner was also prejudiced by Counsel 1's deficient performance. First, "[t]o show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel." Id. 566 U.S. 147, 132 S.Ct. 1409, 182 L.Ed.2d 379. Here, this is not in question. Petitioner confirmed that, had he been aware of a 10-year offer that he would have accepted it. App. 69.

The second step to show prejudice under these circumstances is to "demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law." Id. 566 U.S. 147, 132 S.Ct. 1409, 182 L.Ed.2d 379. Here, while it is clear ASOL 2 vehemently opposed an offer below 25 years, Petitioner would have accepted the plea offer—if

timely conveyed—at the time it was offered. App. 69; App. 86; App. 94. The offer in question was not made by ASOL 2, but on ASOL 1’s watch. It stands to reason that if ASOL 1 made such an offer, then ASOL 1 would likewise have entered the agreement without cancelling it. Accordingly, Petitioner was prejudiced because, had Counsel 1 timely communicated ASOL 1’s offer, then Petitioner would have accepted it, ASOL 1 would not likely have canceled, and the Plea Court would likely have again followed the recommended sentence.

CONCLUSION

For the foregoing reasons, Petitioner John Dan Cook respectfully requests reversal of the PCR Court's Order o Dismissal, vacation of his sentence, and remand for resentencing to ten years.



Breen Richard Stevens
Appellate Defender

ATTORNEY FOR PETITIONER

This 13th day of May, 2024.

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Counsel for John D. Cook states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. He has reviewed the record of petitioner's post-conviction relief hearing before Judge R. Kirk Griffin, which was held on June 13, 2023, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve him as counsel for John D. Cook.

Respectfully Submitted,



Breen Richard Stevens
Appellate Defender

ATTORNEY FOR PETITIONER

This 13th day of May, 2024.

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May 13 2024

CERTIFICATE OF COUNSEL

S.C. SUPREME COURT

The undersigned certifies that to the best of his ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."



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This 13th day of May, 2024.